INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Regulation involved	2
Statement	3
Argument	6
Conclusion	11

CITATIONS

Cases:

Adelhardt Const. Co. v. *United States*, 107 F. Supp. 845	7
American Smelting Co. v. *United States*, 259 U.S. 75	7
Brown & Son Electric Co. v. *United States*, 325 F. 2d 446	9, 10
John Reiner & Co. v. *United States*, 325 F. 2d 438, certiorari denied, 377 U.S. 931	10
Perkins v. *Lukens Steel Co.*, 310 U.S. 113	7
United States v. *N. Y. & Porto Rico S.S. Co.*, 239 U.S. 88	7
United States v. *Stewart*, 234 F. Supp. 94, affirmed, 339 F. 2d 753	7

Statutes and regulations:

Federal Property and Administrative Services Act of 1949, § 205(c) 63 Stat. 378, 390, as amended, 40 U.S.C. 471, 486 (c)	7
Armed Services Procurement Regulations, 32 C.F.R. §§ 1.100, *et seq*	9
28 U.S.C. 1346(a)(2)	5
Federal Procurement Regulations, 41 C.F.R. §§ 1-1.000, *et seq*	8

Statutes and regulations—Continued Page

Regulations of the Administrator of the General Services Administration Governing the Disposal of Surplus Government Property, 41 C.F.R. §§ 101-45.000, *et seq*:

41 C.F.R. § 101-45.304-10(a) 2, 7, 8

Miscellaneous:

In re Alaska Junk Company, Comp. Gen. Dec. B-149734 8

In re California Truck Parts and Equipment Company, Comp. Gen. Dec. B-141637, 39 Comp. Gen. 617 ..... 8, 10

In the Matter of Surplus Tire Sales, ASBCA No. 9060, 65-1 BCA (C.C.H.) ¶ 4571 8

38 Comp. Gen. 532 9

38 Comp. Gen. 851 9

44 Comp. Gen. 495 9

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 613

GEORGE EPCAR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the United States District Court for the District of Utah (Pet. App. B)[1] are not reported. The opinion of the court of appeals (Pet. App. A) is reported at 377 F. 2d 225.

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "R." refers to the record on appeal in the court of appeals, nine copies of which have been filed in this Court.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1967. A timely petition for rehearing was denied on June 28, 1967. The petition for a writ of certiorari was filed on September 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a bidder on a government contract who failed to post a bid deposit adequate to apply to all its bids may rely on this failure so as to preclude the government's acceptance of one of its distinct unconditioned bids, for which the bid deposit was adequate.

2. Whether the contracting officer misconstrued the bid deposit requirement in the government's invitation for bids by accepting petitioner's unconditioned Alternate Bid No. 1.

REGULATION INVOLVED

The Regulations of the Administrator of the General Services Administration (41 C.F.R. 101-45.000, *et seq.*) provide in pertinent part (41 C.F.R. 101-45.304-10(a)):

> Whenever a bid deposit is required by the terms and conditions of the invitation for bids, the normal deposit for individual type sales shall be 20 percent of the total amount of the bid. * * *

STATEMENT

On November 12, 1965, the government invited dealers in surplus military equipment to submit sealed-bid offers to purchase 126 Army trucks (R. 21-32). The invitation specified, *inter alia*, that "bids may be submitted on any or all items," and that "[t]he Government reserves the right to reject any or all bids, to waive any technical defects in bids, and, unless otherwise specified by the Government or by the Bidder, to accept any one item or group of items in the bid, as may be in the best interest of the Government" (R. 22; Pet. App. B-2). The invitation permitted bidders to "submit a bid conditioned upon the acceptance or non-acceptance of his bids on other line items under this Invitation for Bids" and also to "submit bids on an 'all-or-none' basis" (R. 26; Pet. App. B-3).

The invitation also required all bids to be supported by bid deposits (Special Sealed Bid Conditions, Article AB) (R. 26; Pet. App. B-3, D-4):

> BID DEPOSITS. All bids must be accompanied by a bid deposit of 20% of the total amount bid which must be in the possession of the Sales Contracting Officer by the time set for bid opening. * * * Any bid which is not timely supported by an acceptable bond or bid deposit will be rejected as non-responsive. * * *

Petitioner's bid was submitted on a standard, two-page, General Services Administration form (Pet. App. D-1, D-2). On the face of the form was inscribed "$95,153.56" as the total amount of petition-

er's several bids (Pet. App. D-1). On the reverse side of the bid form, however, petitioner specified that its offer was comprised of four separate "alternate," "all or none" bids (Pet. App. D-2). Alternate Bid No. 1 was for Items 1 through 83 at a total price of $71,523.63. Alternate Bid No. 2 (total price—$17,045.37) was for Items 84 through 110 and for consideration only if petitioner's Alternate Bid No. 1 was successful. Alternate Bid No. 3 (total price—$6,594.56) was for Items 111 through 126 and for consideration only if petitioner's Alternate Bids No. 1 and 2 were successful. Alternate Bid No. 4 (total price—$95,353.56) was for Items 1 through 126 and for consideration only if petitioner's Alternate Bids No. 1, 2 and 3 were unsuccessful. Petitioner's bid also stated (Pet. App. D-2): "In the event the Government withdraws any of the items covered by my all or none bids, I desire the remaining items to be considered on an all-or-none basis."

Petitioner was the high bidder on all four of its alternate bids (Pet. App. B-4). However, petitioner submitted a bid deposit of only $15,000—a $5,000 check and a $10,000 bid bond (Pet. App. B-4, D-1).[2] While this $15,000 was more than the required 20% of Alternate Bid No. 1 ($71,523.63), it was less than 20% of Alternate Bid No. 2 (which consisted of Alternate

---

[2] On the face of the bid (Pet. App. D-1), petitioner stated that it was submitting the required bid deposit in the amount of "$20,000.00 total," which would have been adequate to cover all of the bids. Apparently, petitioner's bonding company failed to comply with instructions to increase the bond (see Pet. App. A-5).

Bid No. 1 plus additional vehicles) and of course less than 20% of all three bids combined. (See Alternate Bids No. 3 and 4, *supra.*) Consequently, the contracting officer awarded petitioner only the trucks covered by Alternate Bid No. 1, which was covered by a sufficient bid deposit and was not conditioned on the acceptance of any of the other bids (R. 3, 6). The remaining bids were rejected because of the insufficiency of the bid deposit (Pet. App. F).

When the awards were announced, petitioner protested the rejection of Alternate Bids No. 2, 3 and 4, but stated expressly (R. 54):

> However, I am not protesting or objecting to award of items 1-83 [Alternate Bid No. 1] to George Epcar Company.

After the contracting officer responded that he was not authorized to waive significant shortages in the bid deposit and thus could not change his award (Pet. App. F), petitioner refused to pay for the trucks awarded to it under Alternate Bid No. 1 (Pet. App. B-5). The contracting officer thereupon ordered petitioner's $5,000 check to be applied in partial liquidation of damages (R. 8).

Petitioner then brought an action in the United States District Court under the Tucker Act, 28 U.S.C. 1346(a)(2), seeking a judgment declaring that no contract existed between it and the government and for that reason refunding its $5,000 bid deposit (R. 1-4). Petitioner contended that by virtue of its own failure to submit a bid bond large enough to cover the total amount of all four of its "Alternate

Bids," all of the "Alternate Bids" were, *ipso facto*, non-responsive to the invitation, and that the contracting officer, therefore, could not accept Alternate Bid No. 1. The government counterclaimed for $8,785.76, the balance of the liquidated damages due it under the contract (R. 6-8). The district court rendered judgment for the government (Pet. App. B) and the court of appeals affirmed unanimously (Pet. App. A).

ARGUMENT

The contracting officer accepted petitioner's Alternate Bid No. 1 since it was covered by a sufficient bid deposit and was not conditioned on the acceptance of any of the other bids. The courts below were plainly correct in ruling that the government's contracting officer properly accepted petitioner's first alternate bid, and that this resulted in a valid and binding contract. The Court of Claims' decision on which petitioner relies does not suggest that the government may not accept a distinct and unconditioned bid for which an adequate bid deposit has been posted. There is no conflict of decisions and further review by this Court is not warranted.

1. Even if we assume *arguendo* that the government's agents failed to obtain from petitioner the bid security required by the Special Sealed Bid Conditions Article AB, this would not afford petitioner an opportunity to renege on its contract after its high, unconditioned bid had been accepted. The bid deposit requirement—which provides a source of liquidated

damages in the event a bidder defaults on its contract—was intended solely for the protection of the government. See *Adelhardt Const. Co.* v. *United States*, 107 F. Supp. 845, 846 (Ct. Cls.); *United States* v. *Stewart*, 234 F. Supp. 94, 100 (D. D.C.), affirmed, 339 F. 2d 753 (C.A.D.C.). And, as the court of appeals noted (Pet. App. A-6, A-7), it is settled that statutes and regulations governing the procedure for contracting with the federal government are enacted for the benefit of the government and are not intended to confer rights on persons dealing with the government. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126; *American Smelting Co.* v. *United States*, 259 U.S. 75, 78; *United States* v. *N.Y. & Porto Rico S.S. Co.*, 239 U.S. 88, 93. Petitioner thus could not object that the government did not stand on its right to consider the bid non-responsive.

2. In any event, there is no merit to petitioner's contention that in accepting one of its bids the contracting officer misconstrued Special Sealed Bid Conditions Article AB. The sale of surplus government property is governed by the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, 40 U.S.C. 471, *et seq.*, and regulations issued by the Administrator of the General Services Administration pursuant to Section 205(c) of that Act, 40 U.S.C. 486(c). The Administrator's regulations (41 C.F.R. 101-45.000, *et seq.*) provide in pertinent part (41 C.F.R. 101-45.304-10(a)):

> Whenever a bid deposit is required by the terms and conditions of the invitation for bids, the nor-

> mal deposit for individual type sales shall be 20 percent of the total amount of the bid. * * *

It was pursuant to this provision that Special Sealed Bid Conditions Article AB requiring bid deposits was included in the invitation for bids.[3]

In interpreting the Administrator's regulation, the Comptroller General of the United States has ruled that where a company has submitted a bid deposit adequate to cover only some of the items upon which it has bid, an award may properly be made to the bidder covering those items as to which the deposit is sufficient (*In re California Truck Parts and Equipment Company*, Comp. Gen. Dec. B-141637, 39 Comp. Gen. 617, 618):

> [A] bid which is proper except that the bid bond is not sufficient to cover the entire procurement may be considered for award of such portion as may be adequately covered by the bid security actually submitted so long as division of the award would not be impracticable or contrary to stated limitations either in the bid or the invitation.[4]

---

[3] The Federal Procurement Regulations, 41 C.F.R. 1-1.000, *et seq.*, cited by petitioner (Pet. 7), have no application to this case. As their title indicates, those regulations govern only the acquisition of supplies by the government, not the sale of surplus property. See 41 C.F.R. 1-1.000, 1-1.002, 1-1.201, and 1-1.209.

[4] Accord: *In re Alaska Junk Company*, Comp. Gen. Dec. B-149734, decided October 4, 1962; *In re Surplus Tire Sales*, ASBCA No. 9060, decided December 4, 1964, 65-1 BCA (C.C.H.) ¶ 4571.

In order to forestall a practice under which bidders obtained "two bites" by deliberately accompanying their offers

In the instant case, it is not disputed that the bid awarded to petitioner (Alternate Bid No. 1) was "adequately covered by the bid security actually submitted." Nor was a "division of the award * * * impracticable or contrary to stated limitations." As the court of appeals stated, under the "plain wording" of the bid petitioner asked the government "to consider the bids separately," and the government, in its invitation for bids, "expressly reserved the right to so consider the bids and 'to accept any one item or group of items in the bid as may be in the interest of the government' " (Pet. App. A-7, A-8).

Petitioner's reliance upon the decision of the Court of Claims in *Brown & Son Electric Co.* v. *United States*, 325 F. 2d 446 (Pet. 5-9), is misplaced. That case arose under the Armed Services Procurement Regulations, 32 C.F.R. 1.100, *et seq.*, and involved a bid deposit requirement in an invitation for a base bid for certain electrical and construction work, and for a bid for additive alternative items to be awarded contingent upon the availability of public funds. The contracting officer in *Brown* rejected a bid because the bid deposit (which was the required percentage

---

with insufficient deposits, the Comptroller General has ruled that proper bid deposits are a material part of bids for government contracts and may not be waived by the contracting officer. See, *e.g.*, 38 Comp. Gen. 532; 38 Comp. Gen. 851; 44 Comp. Gen. 495 (cited at Pet. 7-8). However, the Comptroller General has specifically ruled, in the *California Truck Parts* decision, that those rulings do not apply in a case like the instant one where there is no opportunity for "two bites" by the contractor since he is given no opportunity after bids have been opened to reconsider his offer.

of the base bid) was not the required percentage of the base bid plus the additive alternative items. However, in *Brown*, unlike the instant case, a division of the work would have been "impracticable" and "contrary to stated limitations" [5] in the invitation and bid. The decision in *Brown* does not remotely imply that a contracting officer is precluded from accepting a distinct and unconditioned bid for which there is an adequate deposit. Furthermore, in both *Brown*, and the instant case, the reviewing courts were upholding the decisions of contracting officers. The Court of Claims there expressly stated that it was affirming the contracting officer's decision because it was not "plainly wrong." 325 F. 2d at 449.[6] In the instant case, the courts below found that the contracting officer, in accepting petitioner's Alternate Bid No. 1, had correctly construed the bid deposit requirement. Thus the decision below in no way conflicts with the decision of the Court of Claims in *Brown*.

---

[5] *In re California Truck Parts and Equipment, supra*, p. 8, 39 Comp. Gen. at 618.

[6] See, also, *John Reiner & Co.* v. *United States*, 325 F. 2d 438, 440 (Ct. Cls.), certiorari denied, 377 U.S. 931, where Judge Davis stated for the court:

> In testing the enforceability of an award made by the Government, where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only where the illegality is plain. If the contracting officer has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit [footnote omitted]. * * *

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

CARL EARDLEY,
Acting Assistant Attorney General.

JOHN C. ELDRIDGE,
LEONARD SCHAITMAN,
Attorneys.

OCTOBER 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 278865 307